Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

EDDIE MENDIA, pro se

Petitioner,

v.

HAWKER BEECHCRAFT CORPORATION

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether summary judgment is unconstitutional, because it can [e]xclude issues of material fact, based on the artful pleadings skills of defendants engaged in pleading duals, which is contrary to the language of the 7th amendment to U.S. Constitution, and is a loophole to the Substance and Aims of Federal Laws.

2. Whether the employee having genuine issues of a material fact, and a right to a jury trail, "exist", concede or lose that material fact by artful pleadings of the employer, because that issue is central as to employer's failure to exhaust administrative remedies and the Court's "bar" to subject matter jurisdiction.

PARTIES TO THE PROCEEDING

All the parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari Issue to review the judgment below.

OPINION BELOW

The opinion of the United States court of Appeals Appears at Appendix A to the petition and is unpublished.

The Opinion of the United States District Court Appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals Decided my case was December 17, 2008. No petition for rehearing was timely filed in my case. The jurisdiction of Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 7. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trail by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

42. U.S.C. 2000e-2 Title VII of the Civil Rights Act

29. U.S.C. 623 The Age Discrimination in Employment Act

42. U.S.C. 12112 The Americans with Disabilities Act

STATEMENT OF THE CASE

The question is governed by the Seventh Amendment which provides that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Supreme Court has held that "common law" in the Seventh Amendment refers to the English common law in 1791 no procedure similar to summary judgment existed under the English common law and also reveals that summary judgment violates the core principles or "substance" of the English common law. Despite the uniform acceptance of the device, summary judgment is unconstitutional.

The procedure is well entrenched in our

federal courts through its ubiquity and lengthy history. Summary judgment fails to preserve a civil litigant's right to a jury trial under the Seventh Amendment. A large number of civil cases do not move beyond discovery without at least one motion for summary judgment from the defendant. Summary judgment has been described as "probably the single most important pretrial device used today,"[1] and as "the only viable post-pleading protector against unnecessary trials."[2] Indeed, the extensive use of summary judgment is cited as a significant reason[3] for a group of scholars to argue

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[1] Edward Brunet etal., Summary Judgment: Federal Law and Practice2 (3ded. 2006)

[2] Martin H. Redish, Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix, 57 Stan. L. Rev. 1329, 1339 (2005).

[3] See, e.g., Stephen B. Burbank, Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah? 1 J. Empirical Legal Stud. 591, 592 (2004). In discussing the well-known trilogy of Supreme Court cases regarding summary judgment that were decided twenty years ago, Professor Redish recently stated that these "[c]hanges in the law of summary judgment quite probably explain at least a large part of the dramatic reduction in federal trials." Redish, supra note 2, at 1330;cf.Adam N. Steinman, The Irrepressible Myth of *Celotex*: Reconsidering Summary Judgment Burdens Twenty Years after the Trilogy, 63 Wash.& Lee L. Rev.81, 82, 86–88, 143–44 (2006) (presenting data that demonstrates that federal courts cite the trilogy of cases on summary judgment more often than any other cases).But see Burbank, supra, at 620– 21 (arguing that the effect of summary judgment on the decline of trials did not begin with the trilogy but rather began earlier in the 1970s); Joe S. Cecil etal., A Quarter Century of Summary Judgment Practice in Six Federal District Courts, Oct.25,2006, http://papers.ssrn.com/sol3/papers.cfm? abstract_id=914147

that judges overuse summary judgment, especially in civil rights cases.[4] Other scholars, in contrast, have argued that courts should increase their use of

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(discussing empirical evidence that shows the trilogy has not increased the grant of summary judgment to the extent scholars have previously stated) But see Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgment Grants from Eight District Courts, 2007 Wisc. L. Rev. (forthcoming), available at http://ssrn.com/abstract=912284 (arguing that the data used in empirical studies of summary judgment have significant inadequacies and urging more study with better data).

[4] See, e.g., Theresa M. Beiner, The Misuse of Summary Judgment in Hostile Environment Cases, 34 Wake Forest L.Rev.71,71 (1999); Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants,34Harv.C.R.-C.L.L.Rev.99,101– 02 (1999); Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and A DEA Cases, 34 B.C.L. Rev. 203,206– 07 (1993);cf. Rebecca Silver, Comment, Standard of Review in FOIA Appeals and the Misuse of Summary Judgment, 73 U.Chi.L.Rev.731,757 (2006) (arguing that summary judgment may be overused in FOIA cases).In *Kampouris v. St. Louis Symphony Society*, in his dissent, Judge Mark W. Bennett posed the issue of "the expanding use of summary judgment, particularly in federal employment discrimination litigation" and its "ominous specter of serious erosion of the 'fundamental and sacred' right of trial by jury."210 F.3d 845,850 (8th Cir.2000) (Bennett, J., dissenting). Judge Bennett, sitting by designation on the Eighth Circuit, disagreed with the decision of the majority that the district court properly granted summary judgment for the defendant in a case in which the plaintiff had alleged a violation of the Americans with Disabilities Act. Id. For a discussion of the increased use of summary judgment to dismiss antitrust cases, see Peter D. Ehrenhaft, Is Interface of Antidumping and Antitrust Laws Possible?, 34 Geo. Wash. Int'l L. Rev. 363, 390 (2002).

summary judgment, instead of encouraging settlement to dispose of these cases.[5] This debate is incomplete, however, because it assumes away the most fundamental question about the use of the procedure: whether summary judgment is constitutional at all. Examine the constitutional propriety of the device and conclude that summary judgment should be eliminated altogether because it is unconstitutional under the Seventh Amendment.[6]

The Seventh Amendment provides that "[i]n Suits at *common-law*, the right of trial by jury shall

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[5] See Randy J. Kozel & David Rosenberg, Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment, 90 Va.L.Rev.1849 (2004); Jonathan T. Molot, An Old Judicial Role for a New Litigation Era, 113 Yale L.J.27, 43– 46 (2003).

[6] Some scholars who generally support the use of summary judgment in federal court have assumed that the device is constitutional. See, e.g., Molot, supra note 6, at 44. Others have acknowledged possible problems with some applications of the procedure, without any significant reference to the governing common law. See, e.g., Brunet etal., supra note 1,at 16 (stating that summary judgment rests on "potentially tenuous constitutional foundation"); Arthur R. Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L.Rev.982,1074– 1132 (2003) (discussing possible problems with procedure's constitutionality); cf. Patricia M. Wald, Summary Judgment at Sixty, 76 Tex.L.Rev.1897, 1945 (1998) ("In sixty years summary judgment has grown from a wobbly infant to an aggressive gatekeeper to access to trial—by jury or otherwise. We need to ensure it does not exceed whatever role we want it to play, and to carefully define that role.").One scholar, Ellen Sward, has discussed modern procedures and their inconsistency with the common law. Ellen E. Sward, The Seventh Amendment and the Alchemy of Fact and Law, 33 Seton Hall L.Rev.573 (2003)

be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the *common law*."[7] The Supreme Court has definitively stated that the "common law" in the Seventh Amendment is the English common law in 1791, when the Amendment was adopted,[8] and that a new procedure will be constitutional under the Seventh Amendment if the procedure satisfies the substance of the English common law jury trial in1791.[9] The Court has never described, however, what constitutes the substance of the common law jury trial. Instead, it has examined various common law procedures individually in attempts to compare those procedures to new procedures.[10] In failing to examine appropriately the relevant history, the Supreme Court has upheld every new procedure that it has considered by which a court removes cases from the determination of a jury before, during, or after trial.[11] Under the governing English common law, however, a jury would have decided these very same cases that are being decided by judges today, including cases dismissed by judges upon summary judgment.[12] Indeed, the substance of the common

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[7] U.S. Const. amend. VII (emphasis added).

[8] See infra note 25

[9] Id.

[10] See, e.g., infra Subsection II.B.2.

[11] See Suja A. Thomas, The Seventh Amendment, Modern Procedure, and the English Common Law, 82 Wash.U.L.Q.687,695– 702(2004)

[12] See infra Section I. B; Thomas, supra note 12, at 704–48.

law is surprisingly clear.[13] First, under the common law, the jury or the parties determined the facts. One party could admit the allegations or the conclusions of the evidence of the other party, or the parties could leave the determination of the facts to the jury. A court itself never decided the case without such a determination by the jury or the parties, however improbable the evidence might be. Second, only after the parties presented evidence at trial and only after a jury rendered a verdict, would a court ever determine whether the evidence was sufficient to support a jury verdict. If the court decided that the evidence was insufficient to support the verdict, it would order a new trial. Another jury would determine the facts and decide which party won. In other words, if the court itself believed the evidence it was insufficient, it would never determine who should win. Third, a jury would decide every case in which there was any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party, including the improbable facts and conclusions. These core principles of the common law reveal that summary judgment is unconstitutional. Under summary judgment, a court decides whether a "genuine issue as to any material fact" exists[14] or, in other words, whether "a reasonable jury could return a verdict for the nonmoving party."[15] Under this standard, in contrast to under the common law, the court decides whether

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[13] See infra Section I.B.

[14] Fed.R.Civ.P.56(c).

[15] Anderson v. Liberty Lobby,Inc., 477 U.S. 242,248 (1986)

factual inferences from the evidence are reasonable, applies the law to any "reasonable" factual inferences, and as a result makes the determination as to whether a claim could exist. In other words, the court decides whether the case should be dismissed before a jury hears the case. Under the common law, a court would never engage in this determination. Cases that would have been decided by a jury under the common law are now dismissed by a judge under summary judgment.

Contrary to a common assumption, the Supreme Court has never decided this issue of the constitutionality of summary judgment. For years, the Court and scholars have cited the now century-old *Fidelity & Deposit Co. v. United States*[16] for the proposition that summary judgment is constitutional under the Seventh Amendment. The procedure held constitutional in *Fidelity*, however, was not the same nor even similar to summary judgment under Rule 56. Under the procedure in *Fidelity*, the court accepted the facts alleged by the nonmoving party as true. Under summary judgment, in contrast, the court does not accept the facts of the nonmoving party as true but instead determines whether the evidence of the nonmoving party is sufficient. Become there are legal and institutional reasons for the acceptance and use of summary judgment by the courts. First the failure of the Supreme Court to state what constitutes the substance of the common law has led the Court to move away from the common law and thus to the drastic change from the

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[16] See Fidelity and Deposit Co. v. United States 187 U.S. 315 (1902)

role of the jury as decision-maker under the common law to the role of the judge as decision-maker under summary judgment. Let's demonstrate why summary judgment is unconstitutional, and begin with an explanation of the Supreme Court's jurisprudence on the Seventh Amendment, under which the Court has stated that the constitutionality of new procedures should be evaluated by comparison of those procedures to the substance of the English common law jury trial in 1791. Let's describe the three core principles that emanate from the common law jury trial procedures. Next, examine those common law procedures, which include the demurrer to the pleadings, the demurrer to the evidence, the nonsuit, the special case, and the new trial, and show that the procedures contrast with summary judgment. And then demonstrate that summary judgment violates the core principles or substance of the common law jury trial procedures, and conclude that summary judgment is therefore unconstitutional. Then we examine and reject the twentieth-century justifications for summary judgment. These justifications range from the argument that a court decides only law under summary judgment to the argument that the issue has already been decided by the Supreme Court to the argument that summary judgment is necessary to the proper functioning of the federal courts. In the Conclusion, we contrast the Court's jurisprudence on the civil jury under the Seventh Amendment with its jurisprudence on the criminal jury under the Sixth Amendment. In deciding that the criminal jury, rather than the judge, must decide facts that influence sentencing, the Court has emphasized the

relevance of the power of the common law jury.[17] The Court has done so even though the text of the Sixth Amendment does not specifically mandate adherence to the "common law."[18] The Court should likewise follow the common law with respect to its jurisprudence on the Seventh Amendment, which indeed mandates adherence to the "common law," and in doing so, the Court should declare summary judgment unconstitutional.

I. SUMMARY JUDGMENT IS UNCONSTITUTIONAL UNDER THE SEVENTH AMENDMENT

Under summary judgment, a court enters judgment for the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court has interpreted this rule to require that summary judgment is appropriate when "a reasonable jury could [not] return a verdict for the nonmoving party."[19] In making this determination, a court

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[17] See infra note 169.

[18] U.S. Const. amend. VI. 21 Fed. R. Civ. P. 56(c)

[19] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 623, 627-28 (1944) (discussing summary judgment standard and holding that summary judgment is not appropriate under the evidence even though "[i]t may well be that the trial to be with defendant"); 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §2725, at 401-40 (3d ed. 1998).

considers the entire record in the light most favorable to the nonmoving party and draws only the "reasonable inferences [from the evidence] in favor of the nonmovant."[20] If the court decides that a reasonable jury could not find for the nonmoving party, the court enters judgment for the moving party. If the court decides that this standard is not met—in other words, that a reasonable jury could find for the nonmoving party—then the case proceeds to a trial before a jury.

A. The Seventh Amendment and the Common Law

The constitutionality of summary judgment is governed by the Seventh Amendment, which provides that "[i]n Suits at common law the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[21] In its decisions interpreting the Seventh Amendment, the Supreme Court has stated that "common law" in the Seventh Amendment refers to the English common law in 1791, the year when the Amendment was adopted.[22] According to

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[20]Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149-50 (2000).

[21] U.S. Const. amend. VII (emphasis added).

[22] See, e.g., Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435-36 & n.20 (1996); Markman v. Westview Instruments, 517 U.S. 370, 376 (1996); Galloway v. United States, 319 U.S. 372, 388-92 (1943); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476-77 (1935); Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497-98

the Court, the Amendment does not require that the common law is "fixed"[23] or that, in other words, the "form"[24] of the common law is preserved. Instead, the Amendment requires that the "substance"[25] of the English common law in 1791 must be satisfied.[26]

(1931); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 377 (1913). Recently, the Court decided that an appellate court could not review the sufficiency of the evidence and order a new trial where the party who had lost had failed to move for a new trial or judgment notwithstanding the verdict after the jury verdict. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. Ct. 980, 989 (2006). In a footnote, the Court suggested that the arguments of the dissent might be problematic under the Seventh Amendment because of the requirement to follow "the rules of the common law." Id. at 986-87 n.4. In the early nineteenth century, following the adoption of the Amendment, Justice Story, while referring to the English common law as "the grand reservoir of all our jurisprudence[,]" stated that it was "obvious to every person acquainted with the history of the law" why the common law in the Seventh Amendment was the English common law. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750); see also Thompson v. Utah, 170 U.S. 343, 350 (1898) (stating that common law refers to English common law in 1791).

[23] Gasperini, 518 U.S. at 436 n.20.

[24] Gasoline Prods., 283 U.S. at 498.

[25] Id.; see also, e.g., Colgrove v. Battin, 413 U.S. 149, 157-60 (1973); Galloway, 319 U.S. at 392.

[26] The Supreme Court has applied this test to the interpretation of both the first and second clauses of the Seventh Amendment. "[I]n the interpretation of the first clause of the Amendment, the Court has permitted the trial by jury in a broad set of cases including cases with legal remedies, cases that involve new causes of action and cases which involve both legal and equitable claims." Suja A. Thomas, Judicial Modesty and the Jury, 76 U. Colo. L. Rev. 767, 801 (2005). In these decisions, the Court "generally appears to have exercised some

Thus, a new procedure is constitutional if it satisfies the substance of the English common law jury trial in 1791.[27] The Court has not, however, defined what constitutes the substance of the English common law jury trial in 1791. Instead the Court has individually compared various common law procedures to modern procedures.[28] Under this approach, the Court has approved every procedure that it has considered that removes cases from juries, before, during, or after trials, even though such procedures did not exist under the English common law.[29] While the Court has not endeavored to set forth the substance of the common law jury trial, an examination of the common law demonstrates that this substance, or the core principles, of the common law is quite clear. First, as explained in Section I.B., below, under the

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modesty by narrowly construing the judiciary's power in relationship to the jury's power." Id. The Court's interpretation of the first clause of the Amendment contrasts with its immodest interpretation of the second clause. See id. at 801-04.

[27] There has been scholarly criticism of the historical test. See, e.g., James Oldham, Trial by Jury: The Seventh Amendment and Anglo-American Special Juries 6 (2006) [hereinafter Oldham, Special Juries] (citing as an example Martin Redish's criticism of the test). Despite this criticism, the Court continues to state that the historical test should be followed.

[28] See, e.g., infra Subsection II.B.2

[29] See Thomas, supra note 12, at 695-702. One might argue that summary judgment is unconstitutional simply on the basis that the right to a jury trial has been denied under the first clause of the Amendment. In other words, once a jury trial right exists, the case must be tried before a jury. Under the second clause of the Amendment, a judge can examine facts once tried by a jury and then only according to common law rules.

common law, the jury or the parties determined the facts. One party could admit the allegations or the conclusions of the evidence of the other party, or the parties could leave the determination of the facts to the jury. A court itself never decided the case without a determination of the facts by the parties or the jury, however improbable the evidence might be. Second, only after the parties presented evidence at trial and only after a jury rendered a verdict, would a court ever determine whether the evidence was sufficient to support a jury verdict. Where the court decided that the evidence was insufficient to support the verdict, the court would order a new trial. Another jury would determine the facts and decide which party won. The court itself would never determine who should win if it believed the evidence was insufficient. Third, a jury would decide a case with any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party, including the improbable facts and conclusions.

B. The Conflict Between the Common Law and Summary Judgment

In its decisions regarding the constitutionality of modern procedures under the Seventh Amendment, the Supreme Court has examined procedures under the English common law and made inaccurate comparisons between the English procedures and the modern procedures.

C. Summary Judgment Is Unconstitutional

The Supreme Court has stated that new procedures that affect the jury trial right, like summary judgment, must satisfy the substance of the jury trial under the English common law in 1791.[30] In its jurisprudence, however, the Court has failed to articulate what constitutes the substance of the common law. Instead, the Court has individually compared the new procedures to common law procedures[31] and, under this approach, has held constitutional every new procedure that it has considered that removes cases from juries before, during, and after trial.[32]

In the previous Section, we described the common law procedures that the Supreme Court has attempted to favorably compare to new procedures, including summary judgment and demonstrated that summary judgment does not resemble those procedures. First, summary judgment, under which the court considers only reasonable inferences from the evidence, contrasts with the common law demurrer to the pleadings and the common law demurrer to the evidence, under which the court must consider as true the allegations or facts and conclusions of the opposing party, however improbable those facts or conclusions may be. Second, summary judgment, under which the court dismisses the case with prejudice after deciding that the evidence of the nonmoving party is insufficient,

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[30] See supra text accompanying notes 25-30.

[31] See, e.g., infra Subsection II.B.2.

[32] See supra note 32.

contrasts with the common law nonsuit, under which the plaintiff voluntarily withdraws from a case without prejudice when he believes his evidence may be insufficient. Third, summary judgment, under which the court dismisses a case upon a determination of the general insufficiency of the evidence, contrasts with the common law compulsory nonsuit and the common law special case, under which the court would never dismiss a case based on the general insufficiency of the evidence. Finally, summary judgment, under which the court dismisses a case based on the insufficiency of evidence, contrasts with the common law new trial, under which the court did not dismiss the case but rather ordered a new trial if the evidence was insufficient.

The previous Section, also demonstrated that core principles emanate from the common law procedures and that summary judgment violates these principles, or the substance, of the common law. Summary judgment violates the first core principle that the jury or the parties determined the facts. The court itself would never decide a case without such a determination of the facts by the jury or the parties. Under summary judgment, contrary to this principle, the court decides the case without a jury or the parties deciding the facts. The court assesses the evidence, decides what inferences from the evidence are reasonable, and decides whether a reasonable jury could find for the nonmoving party.

Summary judgment also breaches the second core principle of the common law that a court would determine whether the evidence was sufficient to support the jury verdict only after the parties presented evidence at trial, and only after a jury

rendered a verdict. Even then, the court would order only a new trial, not judgment, if the evidence was insufficient. In contrast, under summary judgment, a court orders judgment for the moving party prior to trial if the court determines that the nonmoving party's evidence is insufficient.

Finally, summary judgment violates the third core principle of the common law that a jury, not a court, decided a case that had any evidence, however improbable, unless the moving party admitted all facts and conclusions of the nonmoving party, including the improbable facts and conclusions. In contrast, under summary judgment the moving party does not admit the truth of the nonmoving party's evidence. Instead, the court determines the reasonableness of the evidence and removes cases from the jury based on this assessment.

Using the test for constitutionality that the Supreme Court has articulated since the adoption of the Seventh Amendment in 1791, I have described how summary judgment violates the core principles or the substance of the common law and is therefore unconstitutional.

THE PLEADING DUALS

July 25, 2006, **Doc. 1** entered.

Page 5 states in part in attachment:

Wade called me at home on May 4, 2005, telling me that my request for medical leave was still being reviewed none the less he was doing paper work per attendance policy. Wade informed me that he had checked with Terry Huston his boss about

our conversation an hour earlier. I wanted to use my two and a half days of vacation and also informed him that I had requested to Morrie, Manager of First Aid, earlier that day to use my vacation. Wade said Terry was saying no because it hadn't been scheduled. July 5, 2007 **Doc. 45** entered plaintiffs Motion to Compel Discovery. In the attached memorandum in support of plaintiffs Motion to Compel Discovery, Plaintiff states in Part: On May 4, 2005, plaintiff reported to O.H.S. at Plant 1 to submit doctor's note on Rx pad to be off work from May 2 to May 9 of 2005. Morris stated that he would put these with the others pending review. Morris stated that this note was better than the one from the chiropractor. Morris, Manager of O.H.S. asked me if I wanted to use my vacation that I had and I said, "Oh yes I do, I was saving it but I will use it." Luckily he thought of it because I said I haven't been able to think straight with all the pain and worry; I was mentally numb.

Later that same night still on May 4, 2005, I got a message that Wade had called. I called Wade stating my request was still pending however if denied I am facing termination per new attendance policy. Plaintiff stated to Wade that I had already requested my 2 1/2 days of vacation earlier today to Morrie at O.H.S. Wade stated, "Oh, you want to use your vacation." I said yes I did. Wade asked me to call back. When I called back Wade informed me that he had checked with Terry Huston and Terry said no. It had to be prescheduled.

July 9, 2007 **Doc 46** entered. Pretrial Order Under Defendant's Contentions

P. 13 defendant states in part:

Plaintiff failed to report to work on May 4 and 5, 2005 (Wednesday and Thursday).

Plaintiff had no sick leave or FMLA leave available and received two infractions for each day. Plaintiff asked to use vacation time for some of his absences, but vacation time must be scheduled and approved in advance of the absence, not retroactively.

July 13, 2007 **Doc 48** entered. Plaintiff's Response to Defendant's Response to Plaintiff's Motion to Compel Discovery Plaintiff states in part:

See: Psychological report attached as exhibit 1. Plaintiff is not before this Court with any legal expertise and certainly not with the same clarity of mind as opposing counsel. My mental condition is still a great hindrance in progressing promptly, efficiently, and diligently in discovery. Plaintiff asked the court for any accommodation the court can make. Plaintiff was trying to renew the request to the court for appointment of counsel. Exhibit 1 contained a detailed psychological report.

July 23, 2007 **Doc 51** entered. Defendant's Motion for Summary Judgment P. 13 L.50 states in part:

On May 4, 2005, plaintiff's supervisor, Wade Simmons, called plaintiff at home to let him know that he was at a Step 2. Plaintiff was not at home, but Simmons left a message with plaintiff's brother, asking plaintiff to call him (Mendia Depo attached hereto as Exhibit 5, at p. 179 11. 13-p. 181. 11. 18).

P. 14 L. 51 States:

When plaintiff returned Simons' call,

Simmons warned plaintiff that he was being issued Step 1 and Step 2 written warnings. (Mendia depo., attached hereto as Exhibit 5, at p. 181, 11. 1-12). According to plaintiff, he asked Wade Simmons if he could use vacation to cover the days he had already missed. (fd. at p. 184, 11. 15-20.). Simmons said no, because vacation time has to be scheduled in advance and approved by supervision. (Id. at p. 184, 11/ 21-25). Throughout the time plaintiff had worked for defendant, he was aware that vacation time had to be requested in advance of the absence, and that such requests had to be approved by the immediate supervisor. (fd. at p. 187, 11. 24-p. 188, 11. 3).

The actual page that defendant referenced from my deposition, Mendia Depo, Vol. 1, p. 184 11. 1-25 States:"... terminated until you have a Step 3, correct?"

A. Yes.

Q. So Wade was actually doing you a favor telling you, hey, you're at a Step 2, right?

A. l thought so, but come to find out, no.

Q. Why was that not to your disadvantage to know?

A. Well, because when we were talking that Wednesday night, you know, I told him I been in there to talk to Morrie that morning and we had discussed vacation, you know. And I told Morrie that Morrie was the one that brought it up, he asked me, "Well, what about your vacation that you got." I said, "Well, I don't want to use that unless I have to. But if I have to, yeah, l want to use it's And that night when I talked to Wade, you know, I told him about that. I said, "Wade, I already talked to Morrie about,

you know, if there's a problem like that, you know, that, yeah, I would like to use my vacation." And he says, "Well, I've got to check with Terry. Can you call me back in a little bit?" And I said, "Yeah." When I called back in a little bit, he told me that Terry had refused it because it wasn't prescheduled.

P. 14 L. 53 states:

On May 4, 2005, plaintiff brought in a prescription pad slip signed by Dr. Johnson, stating, please excuse this patient from work 5-2-05 to 5-6-05. May return 5-9-05." (Prescription Pad Note Dated May 4, 2005, attached hereto as Exhibit 32). Morrie Scheffler told plaintiff that the information would be reviewed by the company doctor. (Mendia Depo., attached hereto as Exhibit 5, at p. 219, 11. 1-5). The Plaintiff sworn deposition testimony was now entered into the pleading and part of the record.

P.35 defendant states: With regard to item (6) above, the fact that Wade Simmons called plaintiff at home on May 4, 2005 to warn him that he was already at a Step 2 in the attendance disciplinary process, plaintiff cannot and has not explained why that would constitute an adverse job action. All Simmons did was to tell him the facts as they existed. The call from Simmons gave plaintiff the opportunity to either get himself back to work the next day, thus avoiding the Step 3 termination, or to make a timely request to use vacation for his absence on May 5, 2005. Plaintiff did neither, and thus incurred the final two attendance infractions that let to his termination. The adverse job action happened in spite of Simmons' warning call to plaintiff, and not because of it.

August 13, 2007 **Doc 53**

Plaintiff's response to Defendant's Motion for Summary Judgment

P.5 L.51 Plaintiff states in part: Controverted Simmons called plaintiff at home and warned him that he was being issued Step 1 and Step 2 written warnings. Plaintiff had previously asked Simmons if he could use vacation days to cover the days he had already massed. Simmons said he would check into it. (Plaintiffs Exhibit 8, Mendia Declaration at 29 Vacation times were scheduled at the beginning of the year. Plaintiff was not at work at the time this schedule was prepared and thus could not request specific vacation days. (Mendia Declaration, plaintiff's Exhibit 8 at 30 Continuing with Doc. 53 in Plaintiffs Declaration Exhibit 8 , P. 4, L. 29, Plaintiff States:

On May 4, 2005 I received a call from Mr. Simmons who told me I had a Step 1 and Step 2 disciplinary action against me because of my absences. I asked him what he had found out about using my vacation time. I had previously requested this of him and the Manager of First Aid. Mr. Simmons he told me I could not use it, that it had to be prescheduled.

Plaintiff's Exhibit 12

Raytheon Aircraft Company Position Statement

Dated 2/21/06 which states in part: **Page 4**

Mendia called in on May 9, 2005, four (4) hours after the shift started, and requested a day of vacation. Management told him that an employee

must request vacation before the start of his or her shift. Because Mendia called in after the start of his shift, they denied his request. This is the only time that Mendia requested vacation to cover an absence in May 2005.

For them to lie to the Kansas Human Right Commission at this point on 2-21-06 first a little More than a year shows a definite inference of discriminatory discharge and is evidence that the defendant's pro-offered reason i.e.: vacation benefit, was pretextual and unworthy of belief.

What they don't want is for an investigating agency looking into the vacation benefit. Because in connection with the vacation issue Plaintiff alleges that the attendance policy that he was fired under considered impermissible characteristics in its implementation verse the old attendance policy. The investigating agency was prevented from uncovering evidence that the defendant acted **contrary** to the written company policy prescribing the action to be taken by the defendant under the circumstances... see, eg. Mohammed 698 F.2d at 400-01.

This lie that was relied on by the investigating agency in their findings of no probable cause adversely affected my showing as it regards a prima fascia showing an evidentiary hearing was held on December, 13, 2007 to discover evidence so the issues before the District Court on December 13, 2007 where defendant's Doc. 55 filed August 16, 2007, Motion for Order Requiring Disclosure and Doc. 58, entered September 10, 2007, Defendant's Reply to Plaintiff's Response. Plaintiff had before the court Doc. 56, entered August 27, 2007. Plaintiff's

Cross–Claim to Defendant's Invoking Violation of Rule 11 of F.R.Civ.P. For Sanctions. In the SUBSTANCE of Doc 56, Plaintiff tried to show the District Court the existence of a genuine material issue of fact wanting the defendant to stipulate to. The District Court would then have to address whether the Defendant had exhausted administrative remedies and make a finding to a bar of Subject Matter Jurisdiction.

Plaintiff was submitting documentary exhibits pursuant to Doc. 46, 4b, Pre trial Order which states: The following documents constitute business records with in the scope of Fed. R. Evid. 803 (6) and may be introduced in evidence during trial without further foundation, subject to objections based solely on grounds of relevancy:

c. Legible copies of exhibits may be used during trial in lieu of originals.

d. The parties have stipulated to the admission of the following trial exhibits:

Plaintiff's KHRC records;

Plaintiff's EEOC records.

Plaintiff did submit Raytheon Aircraft Company Position Statement in Doc 56, Exhibit 1. which states in part: Page 4

Mendia called in on May 9, 2005, four (4) hours after the shift started, and requested a day of vacation. Management told him that an employee must request vacation before the start of his or her shift. Because Mendia called in after the start of his shift, they denied his request. This the only time that Mendia requested vacation to cover an absence

in May 2005.

There was no dispute that defendant made this statement to KARC/EEOC. A material fact is "genuine" because a reasonable jury could find in favor of the nonmoving party see. Anderson V. Liberty Lobby, Inc. 477 U.S. 242,248 (1986) "that the requirements of the rules of procedure should be liberally construed and that mere technicalities should not stand in the way of consideration of a case on its merits" Torres, 487 US at 316 (citing Foman v. Davis, 371 U.S. 178, 181 (1962)). Thus, if a would-be appellant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if his or her action is the functional equivalent of what the rule requires. Torres, 487 U.S. at 317.

The court is required to consider all the evidence set forth in the papers and all inferences reasonably deducible from such evidence. See. Asore VV. Hartford Fire Ins. Co 1991 (1 Cal. App – 4th 856-862).

The District Court did not address plaintiffs Cross-claims at the hearing on December 13, 2007. The District Court had already acquiesce with defendant's mini – motions in Doc 57 docketed 2 months prior to the hearing date but Doc 56, should have controlled because it pre-dated Doc 57.

These issues ceased to exist because of Plaintiff pro se status and mental impairments preventing Plaintiff to sustain a point-by-point pleading and sustain a line of arguments resulting in

fundamental unfairness. Pleadings of the defendant and the case law relied on are contrary to the provisions of the 7 amendment. Plaintiff plainly stated to the District Court, in Doc. 53, p-16, the 10th Circuit ruling stating in Stinnett v. Safeway, Inc. 337 F.3d 1213.1216 (10th Cir. 2003) that at the summary judgment stage "all inferences arising from the record before us must be drawn and indulged in favor of the [nonmovant]" and further stated that "...The weighing of the evidence... [is a] **jury function,** not that of a judge."

CONCLUSION

It is appropriate time for the Court to change its jurisprudential course regarding the Seventh Amendment and hold summary judgment unconstitutional. Federal courts frequently employ summary judgment to dispose of cases, and the procedure has, thus contributed to the decrease in the availability of civil jury trials, and is a Loophole to the substance and aims of Title VII of the Civil Rights Act, The Age Discrimination in Employment Act, and The Americans with Disabilities Act.

Having recently taken a renewed interest in the proper role of the jury under the Sixth Amendment,[33] it would be fitting for the Court to examine this issue in the context of the Seventh Amendment. In the last seven years, in interpreting the Sixth Amendment, the Court has given power back to the criminal jury, emphasizing the historical

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[33] U.S. Const. amend. VI.

role of the jury.[34] In comparison, the text of the Seventh Amendment, which requires the court to follow the "common law," dictates an even more significant role for history in the preservation of the right to a civil jury trail under the Seventh Amendment.

The three core principles emanate from the common law that demonstrates the unconstitutionality of summary judgment. First, under the common law, the jury or the parties determined the facts. The Court itself never decided a case without such a determination. Second, a court would determine the sufficiency of the evidence only after a jury trail, and if the court believed that the evidence was insufficient, it would order only a new trail. The court would never order judgment for the moving party upon a review of the sufficiency of the evidence. Third, a jury would decide a case that had any evidence, however improbable that evidence was, unless the moving party admitted the facts and conclusions. Summary judgment, under which a court dismisses a case after its assessment of the sufficiency of the evidence, including the reasonableness of the factual inferences, wholly contracts with these principles. Accordingly, the Court should, following the historical mandate of the Amendment and declare summary judgment unconstitutional, so prays Petitioner for a writ of certiorari.

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[34] See United States v. Booker, 543 U.S. 220,230-34(2005); Blakely v. Washington, 542 U.S. 296,305-06(2004); Ring v. Arizona, 536 U.S. 584,607,609 (2002); Apprendi v. New Jersey, 530 U.S. 466,476-80 (2000).

Respectfully submitted,

FILED
United States Court of Appeals
Tenth Circuit
December 17, 2008
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDDIE MENDIA,

Plaintiff-Appellant,

v.

HAWKER BEECHCRAFT CORPORATION,

Defendant-Appellee.

No. 08-3112
(D.C. No. 6:06-CV-01212-JTM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **O'BRIEN**, **McCONNELL**, and **TYMKOVICH**, Circuit Judges.*

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a

Pro se plaintiff Eddie Mendia sued his former employer, Hawker Beechcraft Corporation, after Hawker terminated his employment. He alleged claims pursuant to Title VII of the Civil Rights Act (Title VII), 42 U.S.C. § 2000e-2; the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623; and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112. He also asserted an intentional infliction of emotional distress claim. The district court granted summary judgment in favor of Hawker on all claims. Mr. Mendia appeals.

Background

The district court provided a thorough summary of the facts, and we need not restate them in detail here. Aplee. Supp. App., Vol. III at 686-89. Suffice it to say that Mr. Mendia, who is of Mexican ancestry, worked for Hawker from 1987 until May 11, 2005, when he was terminated for violating its attendance policy. At the time of his termination he was fifty-seven years old. *Id.*, Vol. I at 12. He claims he was rendered disabled as a result of being struck by lightening in 1995, which allegedly causes him to suffer confusion and memory loss. He also claims he was further disabled by a 2004 car accident in which he suffered a neck injury.

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decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

After Hawker terminated his employment, Mr. Mendia filed a complaint with the Kansas Human Rights Commission and a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). This federal case followed.

Under Title VII, the ADEA, and the ADA, Mr. Mendia was required to file a timely administrative charge within 300 days of any alleged discriminatory action. *Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1222 (10th Cir. 2006). He filed his EEOC charge on November 7, 2005. Aplee. Supp. App., Vol. I at 286. Therefore, the discriminatory actions on which he bases his claims must have occurred on or after January 11, 2005. *See Haynes*, 456 F.3d at 1222. But many of the alleged actions took place long *before* January 11, 2005. *See, e.g.*, Aplee. Supp. App., Vol. III at 690, 693, 701. Accordingly, the district court held that Hawker was entitled to summary judgment on "portion[s]" of Mr. Mendia's Title VII, ADEA, and ADA claims (*i.e.*, those claims filed out-of-time). *Id.* at 690. Notwithstanding, and acknowledging Mr. Mendia's pro se status, the court proceeded to address the merits of all alleged discriminatory actions: those that took place before and after January 11, 2005.

Turning first to his age discrimination claim, which arose from several "age-based comments," *id.* at 693, the district court found it unlikely that Mr. Mendia could make out a prima facie case. But, even if he could, Hawker had "offered a legitimate, nondiscriminatory reason for its employment decision, namely that [Mr. Mendia] failed to comply with [Hawker's] clearly stated attendance policy." *Id.*

at 692. And, since "there [was] absolutely nothing in the record to indicate that [Mr.] Mendia was terminated due to his age[,]" *id.*, the district court concluded that he could not meet his burden of demonstrating Hawker's reason for terminating him was pretextual. Accordingly, the court held his age discrimination claim could not survive summary judgment.

The district court next found that Mr. Mendia could make out a prima facie case of race discrimination because "he was seemingly qualified for his position, was discharged, and replaced." *Id.* at 695. Hawker countered with the same legitimate, nondiscriminatory reason for its employment decision. And, Mr. Mendia again failed to demonstrate pretext. He was unable to show "that any other employee was treated more leniently under the attendance policy" and he failed to offer any "evidence [of] pretext, other than vague references to differing treatment given to non-minorities." *Id.* The district court therefore concluded that his race discrimination claim could not survive summary judgment either. It went on to note that although Mr. Mendia asserted a claim for racial harassment (based on seemingly benign statements he overheard, like, "'Eddie plays the system,'" *id.* at 696), his EEOC charge was totally devoid of any such claim and even if he had exhausted it, Hawker would still be entitled to summary judgment on the merits of his racial harassment claim.

Turning to Mr. Mendia's alleged disability, the district court concluded that he was unable "to establish the first prong of his prima facie case, that

he is a disabled person under the ADA." *Id.* at 701; *see* 42 U.S.C. § 12102(2) (defining disability). In so holding the court observed that by Mr. Mendia's "own admission, he was able to overcome the memory problems associated with his alleged lightning strike by taking notes," and that even if it were to find that he could demonstrate a physical or mental impairment, he still could not "prove that the impairment substantially limits a major life activity." *Id.* at 700. The court further noted that although Mr. Mendia "seemingly asserts" a claim for disability harassment (based on colleagues calling him "'Lightning'" in 1995 and 2004), he "failed to properly exhaust his administrative remedies," and even if he had exhausted his remedies, the claim must fail because there was "no severe and pervasive intimidation, ridicule or insult directed toward [Mr.] Mendia." *Id.* at 701.

Finally, the district court considered and rejected Mr. Mendia's common law claim for intentional infliction of emotional distress. In so doing, it observed that by Mr. Mendia's "own admission, the meeting at which his termination occurred was 'straight cordial, and formal.'" *Id.* at 702.

Discussion

Our jurisdiction arises under 28 U.S.C. § 1291. "We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court." *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005). "When applying this standard, we view the

evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Id.*

Liberally construing Mr. Mendia's pro se appellate brief, *Cummings v. Evans*, 161 F.3d 610, 613 (10th Cir. 1998), he contends (1) the district court abused its discretion by failing to consider his request for appointment of counsel; (2) default judgment should be entered in his favor because Hawker "lied as to a critical genuine material fact[,] i.e. VACATION Request," Aplt. Opening Br. at 2; and (3) the district court erred in finding portions of his Title VII, ADEA, and ADA claims untimely. We disagree.

Appointment of counsel was not an issue in the parties' summary judgment briefing. Rather, Mr. Mendia filed a motion for appointment of counsel shortly after he filed his federal complaint. A magistrate judge denied the request without prejudice, Aplee. Supp. App., Vol. I at 2 (docket entry no. 5), and Mr. Mendia never filed an objection or otherwise--as far as we can tell--renewed his request for counsel in the district court. *Id.* at 2-9 (balance of docket). Mr. Mendia's request for default judgment on account of Hawker's alleged "lie" is likewise unavailing. Indeed, the district court implicitly addressed this issue, noting that it had "[e]xcluded ... allegations of fact which are not supported by the cited evidence, which are grounded on hearsay or other inadmissible evidence, or which reflect an unexplained and unjustified contradiction of earlier deposition testimony." *Id.*, Vol. III at 686. Lastly, the district court did not err in finding portions of Mr. Mendia's Title VII, ADEA, and ADA claims

untimely. Having reviewed the briefs, the record, and the applicable law in light of the above-mentioned standard, we conclude that Mr. Mendia has raised no reversible error in this case.

We therefore AFFIRM the judgment of the district court for substantially the same reasons as stated in its order dated January 17, 2008.

Entered for the Court

Timothy M. Tymkovich

Circuit Judge

App. 8

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

EDDIE MENDIA,
Plaintiff,

vs. Case No. 06-1212-JTM

HAWKER
BEECHCRAFT
CORPORATION,
Defendant,

MEMORANDUM AND ORDER

Presently before the court is defendant Hawker Beechcraft Corporation's (Hawker) motion for summary judgment (Dkt. No. 51). Plaintiff Eddie Mendia (Mendia) filed a pro se Act of 19642 42 U.S.C. § 2000 et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. Media also alleges a common law cause of action for intentional infliction of emotional distress. For the reasons stated below, the court grants Hawker's motion.

I. Standard of Review

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). An issue is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." Thom v. Bristol-Myers Squibb Co., 353 F.3d 848, 851 (10th Cir. 2003) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." Id. In considering a motion for summary judgment, the court must examine all of the evidence in a light most favorable to the nonmoving party. Lifewise Master Funding v. Telebank, 374 F.3d 917, 927 (10th Cir.2004).

The party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)) (emphasis in Matsushita). The opposing party may not rely upon more allegations or denials contained in its pleadings or briefs. Rather, the opposing party must present significant admissible probative evidence supporting that party's allegations. Anderson, 477 U.S. at 256.

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R.

Civ. P.1).

II. Facts

The court makes the following findings of fact. Excluded from these findings are allegations of fact which are not supported by the cited evidence, which are grounded on hearsay or other inadmissible evidence, or which reflect an unexplained and unjustified contradiction of earlier deposition testimony. See Franks v. Nimmo, 796 F.2d 1230 (10th Cir. 1986).

Mendia, who is of Mexican ancestry, worked for Hawker from June 8, 1987 to May 11, 2005, when he was involuntarily terminated due to violations of Hawker's attendance policy. At the time of his termination, Mendia was an Avionics Technician for Hawker, which is a manufacturer of aircraft for general aviation and military use. Mendia is currently fifty-nine years old, and claims that an alleged lightning strike in 1995 rendered him disabled in that he is often confused and has memory loss. Additionally, Mendia claims that he is further disabled due to a neck injury that occurred in November 2004.

Hawker's attendance policy, which it furnished to its employees, provided that an unexcused absence of one hour or less would result in one infraction, an unexcused absence between one and four hours would result in two infractions, an unexcused absence of more than four hours would result in four infractions, and a full day absence where proper notification was not provided to the company could

result in four infractions. An employee who incurred four infractions within a 180-day period would receive a Step 1 written remand, and a Step 2 written remand would follow if that employee incurred fur more infractions in a 180-day period within one year of receiving the first written remand. Step 3, which is termination of employment, would result if an employee incurred four additional infractions in a 180-day period within one year following receipt of a Step 2 written remand, or if an employee was absent for five or more consecutive working days without a valid reason. Further, termination could occur if an employee failed to properly notify the company of their absence for three consecutive working days, or if the employee failed to properly notify the company of their absence on three nonconsecutive working days in a rolling twelve-month period.

Mendia was involved in an automobile accident on November 16, 2004, when his car was rear-ended at a stoplight. Mendia was not hospitalized as a result of the accident, was not treated at the scene, and was not transported by ambulance to the emergency room. Never the less, the following day, Mendia did seek treatment for neck pain from his personal physician, Dr. Matthew Johnson, who prescribed pain medication and physical therapy. After the accident, Media requested and received FMLA leave from Hawker until February 15, 2005. After the exhaustion of all the available FMLA leave, Hawker permitted Mendia to continue on an unpaid medical leave of absence until February 28, 2005. On February 21, 2005, Dr. Johnson released Mendia to return to work, with the following restrictions: (1) no overtime for one month; (2) no more than eight hours

per day spent in climbing, kneeling, crawling, stooping, crouching, standing, lifting and carrying, pushing, pulling, or working in high places. Hawker complied with all of those restrictions when Mendia returned to work on February 28, 2009.

Mendia claims that he re-injured his neck while at home on Thursday, April 28, 2005. He went of Dr. Johnson that same day, and the doctor released him to return to work on May 2, 2005, with the "no overtime" restriction in place for thirty days. Due to the purported neck 2005, with the "no overtime" restriction in place for thirty days. Due to the purported neck injury, Mendia was absent from work on Thursday April 28 and Friday April 29, 2005, yet had no available sick leave. In accordance with hawker's attendance policy outlined above, Mendia received attendance infractions for each date, which resulted in a Step 1 written warning. Further, Mendia was absent from work on Monday, May 2 and Tuesday, May 3, 2005, which resulted in a total of four attendance infractions and thus a Step 2 written warning. On May 4 2005, Mendia's Team Leader, Wade Simmons, called him at home to let him know that he as at a Step 2. Mendia did not report to work on that day either, and thus received two additional infractions.

Prior to being informed that he had reached a Step 2 written warning, Mendia did bring a letter to Hawker from chiropractor Blake Betty o May 2, 2005, stating that Mendia was being treated fro muscle spasms in his lower back; nevertheless, the nurse at Hawker who manages the Occupational Health Services Department informed plaintiff that he was unsure whether the company doctor would accept the

excuse from Mendia's chiropractor. Later, Mendia brought I a prescription pad signed by Dr. Johnson, stating, "Please excuse this patient from work 5-1-05 to 5—6-05. May return 5-9-05." Unlike prior Medical information Authorization forms completed by Dr. Johnson, the note written on a prescription pad did not state (1) that Dr. Johnson had actually seen Mendia; (2) the nature of the condition causing the absence; (3) the treatment being provided; or (4) any limitations that might apply.

Mendia further failed to attend work on Thursday, May,5, 2005, which caused him to incur two additional attendance infractions, giving him a total of twelve infractions in a 180-day period, which would call for termination under Hawker's attendance policy. Mendia reported to work for a few hours on Friday, May 6, 2005, where Hawker was finally able to issue him the Step 1 and Step 2 written warnings he had incurred over the previous days.

On May 10, 2005, the Occupational Health Services department notified Labor relations that Hawker's company doctor had reviewed the documentation provided by Mendia and concluded that there were no objective findings identified in the medical records that supported an absence from his required employment responsibilities. Accordingly, on that day, plaintiff was given a step 3, which is termination of employment.

During his employment with Hawker, Mendia never made complaint to the Human Resources department. Subsequent to his termination, however, Mendia filed a complaint with both the

Kansas Human Rights Commission (KHRC) and the equal Employment Opportunity Commission (EEOC) on November 7, 2005. In those actions, Mendia alleged that he heard non-supervisory co-workers make unspecified racial remarks, that he heard his supervisor, Wade Simmons, say on more than one occasion, "Eddie plays the system."

III. Analysis

A. Timeliness

Hawker claims that it is entitled to summary judgment on portions of Mendia's Title VII, ADEA, and ADA claims because Mendia did not include a claim on discrimination in his administrative complaint, and because he did not timely file his administrative complaint. Mendia failed to address any of Hawker's assertions regarding this issue.

Claims pursuant to Title VII, the ADEA, and the ADA require the timely filing of an administrative complaint with the EEOC within 300 days of the challenged discriminatory action. Haynes v. Leave 3 commc'ns, 456 F.3d 1215, 1222 (10th Cir. 2006). The Tenth Circuit has noted that a "plaintiff may not bring a lawsuit based upon claims that were not part of a timely-filed EEOC charge." Bartanji v. Sealy Mattress Mfg. Co., 6 Fed. Appx. 720, 722 (10th Cir. 2001). Mendia filed his EEOC charge on November 7, 2005; therefore, the discriminatory action on which he bases his claims must have occurred on or after January 11, 2005, 42 U.S.C, §§ 12117 (a); 2000e-5; Duncan v. Manager, Dep't of Safety, City & County of Denver, 397 F.3d 1300, 1308

(10th Cir. 2005) (Title VIII); Davidson v. America Online, Inc., 337 F.3d 1179, 1183 (10th Cir. 2003) (ADA); Beard v. Seagate Tech., Inc., 145 F.3d 1159, 1174 (10th Cir. 1998) (ADEA).

Generally, a cause of action accrues "on the date the employee is notified of an adverse employment decision by the employer." Davidson, 337 F.3d at 1187. In determining when a cause of action accrues, the focus is on the discriminatory act and not the point in time when the consequences of the act become painful. See Chardon v. Fernandez, 454 U.S. 6, 8 (1981). A party, therefore, must file a charge within 300 days of the date of the discrete discriminatory act, or lose the ability to recover for it, regardless of whether the time-barred acts are closely related to acts alleged in a timely filed charge. Nat'l R. R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002).

In this case, Mendia complains of several discreet acts of alleged racial discrimination or harassment, each of which took place long before January 11, 2005. Because Mendia did not file a timely administrative complaint concerning these alleged instances of discrimination, Hawker is entitled to summary judgment on the portion of Mendia's Title VII, ADEA, and ADA claims due to inadequate exhaustion of administrative remedies.

Due to the lenient standard given to pro se plaintiffs, this court will still address Mendia's claims on the merits. Nonetheless, even if Mendia had timely filed his complaint with the EEOC, this court would still grant summary judgment to Hawker on all claims for the reasons set forth below.

B. Age discrimination

The ADEA provides that "it shall be unlawful for an employer... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age..." 25 U.S.C.§ 623(a)(1). "Employers are to evaluate [quoting W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 422 (1985)). "The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." Id. at 611.

To prevail in an ADEA claim, plaintiff" must establish that age was a determining factor in the employer's challenged decision." Lucas v. Dover, 857 F.2d 1397, 1400 (10th Cir. 1988) (quoting EEOC v. Sperry corp., 852 F.2d 503, 507 (10th Cir. 1988)). The plaintiff "need not prove that age was the sole reason for the employer's acts, but must show that age made the difference in the employer's decision." Sperry Corp., 852 F.2d at 507 (quoting EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F. 2d 1166, 1170 (10th Cir. 1985)).

Except in cases involving direct evidence of discrimination, age discrimination claims are to be analyzed under the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U>S> 792 (1973). See Marx v. Schnuck Markets, Inc. 76 F.3d 324, 327 (10th Cir. 1996). Under the burden-shifting of McDonnell Douglas, the plaintiff must initially establish a prima facie case of discriminatory discharge. Then, defendant must offer a legitimate, nondiscriminatory reason for its employment

decisions. Randle v. City of Aurora, 69 F. 3d 441, 451 (10th Cir. 1995(. If the defendant does so, then the burden reverts to the plaintiff "to show that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual i.e., unworthy of belief." Marx, 76 F3d at 327.

To establish a prima facie case of age discrimination, the plaintiff must prove: (1) he is within the protected age group; (2) he was replace with a younger person. Miller v. Eby Realty Group LLC, 396 F.3d 1105, 111 (10th Cir 2005). Although Mendia was in the protected age group and terminated, it is unlikely that he can prove that he was doing satisfactory work, or that he was replaced with a younger person. The facts are clear that Mendia did not comply with Hawker's attendance policy; he was absent from work, without the proper excuse, and thus did not do any work at all, much less satisfactory work, for extended periods. Further, Mendia never sought to prove whether he was replace with a younger person. Accordingly, Mendia cannot meet his burden to prove the prima facie case of age discrimination.

Even is Mendia could meet his burden, Hawker has offered a legitimate, nondiscriminatory reason for its employment decision, namely that Mendia failed to comply with its clearly stated attendance policy. Therefore, the burden reverts back to Mendia to show that Hawker's reason was pretextual, by proving either that "a discriminatory reason more likely motivated the employer...or that the employer's reoffered explanation is unworthy of credence." Tex. Dep't of Cmty. Affairs v. Burdine,

450 U.S. 28,256 (1981); Watts v. City of Norman, 270 F.3d 1288, 1293 (10th Cir. 2001). Mendia cannot meet his burden; there is absolutely nothing in the record to indicate that Mendia was terminated due to his age.

Mendia's basis for this age discrimination claim does not appear to be that he was denied promotion or terminated due to his age, but instead that he was subject to the following age-based comments: (1) during the grievance procedure which followed plaintiff's termination, Dan Dymarkowski, Director of Labor Relations, indicated that, Because of plaintiff's age, he could be entitled to some benefits; (2) prior to the time that Wade Simmons became a supervisor, plaintiff overheard Simmons say to another employee, :an old fart like you, how do you keep hanging on ? You must be retiring soon"; (3) in mid 2004, when plaintiff was considering taking a crew chief position on third shift, Wade Simmons said, "But at your age, do you think you could handle all of the overtime that's going to be required?"; (4) in mid 2004, Wade Simmons said, "At your age, wouldn't you rather being doing something more satisfying?"

First, several of those statements, including the remark about benefits, are not discriminatory, and instead were probably intended to e helpful to Mendia. Second, the Tenth Circuit has repeatedly noted that age-based remarks by non-decision makers cannot from the basis of a hostile work environment claim. See, e.g. Herrera v. Lufkin Indus., Inc., 474 F.3d 675, 680 (10th Cir. 2007) (applying the same logic of establishing a hostile work environment to race discrimination); Chavez v. New Mexico, 397 F.3d 826,

832 (10th Cir. 2005) (holding two racially offensive remarks "fall far short of the 'steady barrage' required for a hostile environment claim"); see also Elkins v. Bayer construction Co., 68 F. Supp. 2d 1249, 1259 (D. Kan. 1999) (referring to an employee as "old fart" was insufficient to state a claim under the ADEA). Most of the remarks Mendia has complained about were not from direct supervisors. Further, there mere fact that age was mentioned is not evidence of discrimination. Quite simply, the remarks in question do not rise to the level necessary to establish that Hawker's proffered reason was pretextual. Accordingly, Mendia's age discrimination claim cannot survive summary judgment

C. Race Discrimination and Racial Harassment

1. Discrimination

The McDonnell Douglas burden-shifting framework described above also applies in race-discrimination cases where there is no direct evidence of race discrimination. Orr v. City of Albuquerque, 417 F.3d 1144, 1149 (10th Cir. 2005). The plaintiff in the race discrimination case bears the initial burden of setting forth a prima facie case of discrimination by proving that: "(1) plaintiff belongs to a protected class; (2) plaintiff was qualified for his position; (3) plaintiff was discharged despite his qualifications; and (4) the position was not eliminated after plaintiff's discharge " Malik v. Amini"s Billiard & Bar Stools., Inc. 454 F. supp. 2d 1106, 1112 (D. Kan. 2006) (citing Baca v. Sklar, 398 F.3d 1210, 1216 (10th Cir. 2005)). If plaintiff can show those elements, then the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the

challenged employment action. Randle v. City of aurora, 69 F.3d 441, 451 (10th Cir. 1995). If the defendant makes such a showing, the burden reverts back to the plaintiff to show the proffered reason is pretextual. Id.

Hawker does not dispute that Mendia is a member of a protected class by virtue of his Mexican ancestry, but does dispute, however, that Mendia was satisfactorily performing his job because of his extended absences in excess of the available FMLA leave. Hawker's argument cannot stop Mendia from establishing his prima facie case; however, because in accordance with established Tenth Circuit precedent, the district court should decline to "analyze an employer's assessment of the plaintiff's alleged deficient performance was the employer's legitimate, nondiscriminatory reason for taking the adverse employment action." Day v. Kraft foods N. Am., Inc., 490 F. Supp. 2d 1148, 1155 (D Kan. 2007). Accordingly, Hawker's claim that Mendia was not satisfactorily performing his job will not be sufficient to preclude Mendia from establishing a prima facie case. Thus, Mendia has met his burden to prove the prima facie case by showing that he was seemingly qualified for his position, was discharged, and replaced.

Because Mendia established a prima facie case, the burden reverts to Hawker to articulate a legitimate non-discriminatory reason for the employment action. In this case, Hawker easily meets this standard; it has repeatedly asserted that Mendia's employment was terminated due to his extended absences.

Thus, the burden reverts back to Mendia to show that Hawker's proffered reason is pretextual. To establish pretext, Mendia must show either that "a discriminatory reason more likely motivated the employer...or that the employer's proffered explanation is unworthy of credence." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Watts v. city of Norman, 270 F.3d 1288, 1293 (10th Cir. 2001). Mendia does not dispute that he was absent on the days that lead to his termination, and fails to demonstrate that any other employee was treated more leniently under the attendance policy. Further, Mendia offers no evidence for pretext, other than vague references to differing treatment given to non-minorities. Mendia's claims, however, are not enough to support a finding of pretext, and thus he cannot meet his burden necessary to survive summary judgment. Accordingly, Hawker's decision to terminate Mendia's employment was proper ad does not constitute race discrimination.

2. Harassment

Although Mendia presently asserts a claim for racial harassment, his administrative complaint is totally devoid of any such claim and thus hawker is entitled to summary judgment due to Mendia's failure to exhaust administrative remedies. Even if Mendia had properly preserved the claim, however, Hawker would still be entitled to summary judgment on the merits.

Media alleges that he was subjected to racial harassment by generally claiming that he heard non-supervisory co-workers make unspecified racial remarks, including the seemingly racially benign

statement by his supervisor, Wade Simmons, that "Eddie plays the system."

To survive summary judgment on a racial harassment claim, plaintiff "must show that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." McCowan v. All Star Maint, 273 F.3d 917, 923 (10th Cir. 2001) (quoting Penry v. Fed Home Loan bank of Topeka, 155 F.3d 1257, 1261 (10th Cir. 1998)). When evaluating whether the alleged harassment is severe, the court looks at the all circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Trujillo v. Univ. of Colorado Health Scis. Ctr., 157 F.3d 1211, 1214 (10th Cir. 1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)). The court employs both object and subjective analysis when considering the work environment, and considers all circumstances from the perspective of a "reasonable person in the plaintiff's position." McCowan, 273 F.3d at 923.

Based on these standards, Mendia failed to establish the existence of a racially hostile work environment. His grievances are nothing more than racially benign comments that are not "hallmarks of hostile work environments claims." Trujillo, 157 F.3d at 1214. Further, the record is devoid of evidence which would support an inference that any of the conduct about which Mendia complains

stemmed from racial animus. Instead, the record shows that Mendia was terminated in compliance with Hawker's clearly established, and equally applied, absence policy. The isolated statements from some people in the company that are not racially charged are insufficient to support a claim for racial harassment, and thus summary judgment is granted on this claim as well.

D. Americans with Disabilities Act

1. Disability Discrimination

The Americans with Disabilities Act (ADA) prohibits employers from discriminating 'against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. §12112(a). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The ADA further defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. 12102(2).

Absent direct evidence of discrimination, a claim brought pursuant to the ADA is subject to the same burden shifting approach borrowed from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Davidson v. Am. Online, Inc., 337 F3d 1179, 1189 (10th Cir. 2003); Butler v. City of Prairie Village, Kan., 172 F.3d 736, 747 (10th Cir. 1999). Under this approach, the plaintiff carries the initial burden of establishing a prima facie case by a preponderance of the evidence. See McDonnell Douglas, 411 U.S. at 802. If a plaintiff fails to prove

any element of his prima facie case, then summary judgment is proper. Burnelt v. Pizza Hut of Am. Inc., 92 F. Supp. 2d 1142, 1'153 (D. Kan. 2000). If, however, a plaintiff can prove a prima facie case of discrimination, then defendant must produce evidence of a legitimate, nondiscriminatory reason for the challenged employment decision. Morgan v. Hilti, Inc., 108 F.3d 1319, 1321 (10th Cir. 1997). If defendant satisfies this burden, then plaintiff must introduce evidence "that the employer's proffered reason for the challenged [employment] action was pretextual – i.e., unworthy of belief." Id. (citing Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir.1995)).

To establish a prima facie case of discrimination under the ADA, the plaintiff must demonstrate that: (1) he is disabled within the meaning of the ADA; (2) he is a "qualified individual" meaning that he is "able to perform the essential functions of the job, with or without reasonable accommodation," and (3) the employer terminated or took adverse employment action against the plaintiff because of his disability. See MacKenzie v. City & County of Denver, 414 F.3d 1266, 1274 (10th Cir. 2005); Morgan, 108 F.3d at 1323.

The first element of Mendia's prima facie case concerns the court; the impairments that Mendia asserts do not qualify as disabilities under the ADA. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. 12102(2); Sutton v. United Air Lines, 527 U.S. 471,

478 (1999). Determining whether a disability exists is "an individualized inquiry." Sutton, 527 U.S. at 472. However, "[m]erely having an impairment does not make one disabled for purposes of the ADA." Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 195 (2002).

In this case, Mendia claims that he is actually disabled by the soft tissue neck injury to his neck resulting from an automobile accident in November 2004, and by memory loss and confusion resulting from an alleged lightning strike in 1995. In its motion for summary judgment, Hawker contends that Mendia cannot establish a prima facie case, because he does not have an actual disability. Courts generally employ a three-step process to determine whether an individual is disabled under the "actual disability" prong: (1) determine whether the plaintiff suffers from a physical or mental impairment; (2) identify the life activity affected by the impairment and determine whether it constitutes a major life activity under the ADA; (3) determine whether the impairment substantially limited the major life activity. See Bragdon v. Abbott, 524 U.S. 624, 631 (1998); Poindexter v. Atchison, Topeka & Sante Fe Railway Co., 168 F.3d 1228, 1230 (10th Cir. 1999).

Hawker does not dispute that Mendia was in an automobile accident on November 16, 2004. Hawker does dispute, however, that this injury gives rise to a disability classification under the ADA. Following the accident, Mendia was off work from November 16, 2004 until February 25, 2005. When he returned to work, Mendia's only restrictions were that he should not work overtime, and that he should spend no more than eight hours per day performing

certain movements. Hawker complied with those restrictions, and Mendia was able to return to work. Thus, that accident did not render Mendia disabled.

Hawker does dispute Mendia's alleged lighting strike disability, partly because it was never corroborated by any medical diagnosis. Further, by Mendia's own admission, he was able to overcome the memory problems associated with his alleged lightning strike by taking notes and performing his job accordingly. The courts in this circuit have held on several occasions that far more severe and intransigent conditions do not rise to the level of a disability, as that term is defined by the ADA. See, e.g. Berry v. T-Mobile U.S.A., Inc., 490 F.3d 1211 (10th Cir. 2007) (multiple sclerosis which affected plaintiff's ability to care for herself and perform household tasks not a disability0; Holt v. Grand Lake Mental Health Center, Inc., 443 F.3d 762 (10th Cir 2006) (cerebral palsy that limited caring for herself, performing manual tasks not a disability). Nevertheless, even if Mendia's neck injury and lightning strike constitute a physical or mental impairment, he cannot survive summary judgment, because he cannot prove that the impairment substantially limits a major life activity.

Assuming without deciding that working should qualify as a major life activity, Mendia has not shown that his limitations prohibit him from completing his job or that he is unable to perform any of the life activities completely. Further, by Mendia's own admission, his alleged lightning strike encounter renders his memory faulty, a condition he is able to overcome through the use of note-taking. Accordingly, Mendia has not demonstrated an

impairment to a major life activity and thus has failed to establish the first prong of his prima facie case, that he is a disabled person under the ADA. As such, summary judgment in favor or the defendant is proper on Mendia's ADA claim.

2. Disability Harassment

Mendia also seemingly asserts a claim for disability harassment, contending, among other things, that Denny Britt called him "Lightning" in 1995, and that Wade Simmons asked him if it was Lightning" in the summer of 2004. As with prior claims, Mendia failed to properly exhaust his administrative remedies, and thus his claim for disability harassment should be dismissed based on that procedural ground. Even if Mendia's claim was properly preserved, however, it would still not survive summary judgment on the merits. Due to Mendia's pro se status, the court will briefly examine the merits of Mendia's claims.

The Tenth Circuit has held that hostile work environment claims are actionable under the ADA. Lanman v. Johnson County, Kansas, 393 F.3d 1151, 1155 (10th Cir. 2004). To succeed on a claim for hostile work environment, however, a plaintiff must prove "that a rational jury could find that t the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Anthony v. City of Clinton, 185 F.3d 873, 873 (10th Cir. 1999). In this case, there were allegedly a handful of comments that occurred over a long period of time. There was no severe and

pervasive intimidation, ridicule or insult directed toward Mendia. Accordingly, Mendia cannot severe summary judgment on this claim.

E. Intentional Infliction of Emotional Distress

Mendia claims that the he is entitled to relief due to intentional infliction of emotional distress because of the manner in which his employment was terminated, and because of Hawker's refusal to accept a doctor's note. To establish a claim of intentional infliction of emotional distress under Kansa law, a plaintiff must establish four elements: (1) intentional conduct of the defendant, or conduct by the defendant that was in reckless disregard of the plaintiff; (2) extreme and outrageous conduct; (3) a causal connection between defendant's conduct and plaintiff's mental distress; and (4) extreme and severe mental distress on behalf of the plaintiff. Caputo v. Prof'l Recovery Servs. Inc., 261 F. Supp. 2d 1249, 1265 (D. Kan. 2003) (citing Miller v. Sloan, Listrom, Eisenbarth, Sloan and Glassman, 267 Kan. 245, 257, 987, P.2d 922 (1999)). Conduct is extreme and outrageous if a "civilized society would regard it as exceeding the bounds of decency or utterly intolerable." Id. "The classic test is that liability may be found to exist when the recitation of the facts to an average citizen would arouse resentment against the actor and lead that citizen to spontaneously claim, Outrageous!" Mai v. Williams Indus., Inc., 889 F. Supp. 536, 542 (D. Kan. 1995). Based on these standards, Mendia's claim must fail.

By Mendia's own admission, the meeting at which his termination occurred was "straight cordial, and format." (Dkt. No. 51, Exhibit 5 [Mendia

Deposition]). Nothing at all indicates that it was egregious; instead, Hawker followed company guidelines and then promptly informed Media when his employment was terminated. Additionally, courts have noted that more termination of employment cannot be the basis for an intentional infliction of emotional distress claim. See e.g., Allen v. Miami county Emergency Med Serv., No. 95-1149, 1997 WL 624864, at *12 (D. Kan. Sept. 15, 1997); Fletcher v, Wesley Med. Ctr., 585 F. Supp. 1260, 1262 (D. Kan. 1984). Further, there is no evidence that the calls to Mendia's home were anything more than courtesy calls and warnings to avoid termination, rather than outrageous conduct. Accordingly, a claim for intentional infliction of emotional distress cannot stand.

In sum, Mendia was discharged for failing to maintain satisfactory attendance, which is a legitimate and nondiscriminatory reason. Although Mendia is clearly dissatisfied with the decision to terminate his employment, his proffered evidence is not sufficient to sustain any of his purported claims. As such, his claims cannot stand, and Hawker is entitled to summary judgment on all claims.

IT IS THEREFORE ORDERED this 17th day of January, 2008, that the court grants defendant's motion for summary judgment (Dkt. No. 51).

s/ J. Thomas Marten

J. THOMAS MARTIN, JUDGE